*Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.*

1886
*July* 7.

KALI KRISHNA TAGORE (PLAINTIFF) *v.* GOLAM ALLY (DEFENDANT.)*

*Landlord and Tenant—Suit for ejectment—Repudiation of Title—Setting up different tenure from that alleged by Landlord.*

The plaintiff in 1870 brought a suit for rent, in which the defendant set up and filed a permanent *howladari* lease, but admitted that he held at the rent alleged by the plaintiff, and that suit was decreed, the Court thinking it unnecessary to decide the question of the validity of the tenure set up by the defendant. In a suit brought after a notice to quit, which was found to be invalid, to eject the defendant, and for a declaration that he had no such permanent *howladari* tenure as he alleged, the defendant again set up the *howladari* lease under which he admitted he had paid a fixed rent to the plaintiff: *Held*, that though the defendant repudiated the particular holding which the plaintiff attributed to him, he did not question the plaintiff's right to receive the rent, and therefore did not in any sense repudiate his landlord's title. What he did amounted merely to questioning the right of the landlord to enhance the rent, which was not such a disclaimer as would result in law in a forfeiture of his tenure. The plaintiff therefore was not entitled to eject the defendant without giving him a proper notice to quit.

*Vivian* v. *Moat* (1) distinguished, on the ground that the principle on which it is based is wholly inapplicable in Bengal. *Baba* v. *Vishvanath Joshi* (2) dissented from.

THE facts and contentions in this case are sufficiently stated in the judgment of the Court (PETHERAM, C.J., and GHOSE, J.)

Mr. *Woodroffe* and Baboo *Doorga Mohun Doss* for the appellant.

The *Advocate-General* (Mr. *Paul*), Mr. *Amir Ali*, Mr. *W. M. Doss*, and Baboo *Rash Behary Ghose* for the respondent.

This appeal arises out of a suit brought by the plaintiff Baboo Kali Krishna Tagore, who is the zemindar of Pergunnah Edilpore, against Golam Ally, the defendant, to eject him from certain lands situate in that pergunnah; and for a declaration that the defendant's allegation made in a previous suit between the parties, that

* Appeal from Original Decree No. 262 of 1884, against the decree of Baboo Jagadurlubh Mozoomdar, Rai Bahadur, Subordinate Judge of Furreedpore, dated the 30th of May 1884.

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he, the defendant, had a permanent *howla* interest in the lands, is untrue. The plaint sets forth that the lands in suit, which are within a property named Haturea, were leased out to the defendant's father, one Mahomed Ashak in 1234 (1827,) as a *kursa* or ordinary ryoti tenure, to be held by him as a tenant-at-will; that the said tenure was not granted for agricultural purposes; that subsequently, in the years 1250 (1843) and 1264 (1857) respectively, two dowls or kabuliats were executed by the said Mahomed Ashak in favour of the plaintiff's father, Baboo Gopal Lal Tagore, in respect of the said lands at enhanced rents, the rent reserved by the last dowl being Rs. 421-7-10; that subsequently, in a suit brought by the plaintiff in 1870 for rents of the years 1274 to Srabun 1277 (1867 to July 1870), the defendant set up and filed a permanent *howladari* lease, but at the same time admitting that he had been holding the land at the rent alleged by the plaintiff; that the Court which decided the suit did not consider it necessary to go into the question of the validity of the *howla* set up by the defendant, but decreed the claim for rent, there being, in fact, no dispute as to the amount thereof; that subsequently, in 1284, (1877) the defendant changed the features and character of a portion of the lands by digging tanks without the plaintiff's knowledge, which acts were contrary to the express stipulations of the dowl of 1264, and the custom of that part of the country; that thereupon a notice to quit was served upon the defendant on the 11th Assar 1289 (1882), requiring him to relinquish possession of the lands within fifteen days. The suit was brought upon the basis of the said notice to eject the defendant from the land hitherto held by him, and also to have it declared that the defendant was not entitled to the *howla* which he claimed.

The answer to this suit was that the notice was bad in law; that it was neither sufficient nor reasonable; that the dowls set up by the plaintiff were untrue; that the excavations complained of in the plaint were made some time before the year 1284 from time to time, and that the plaintiff acquiesced in these acts; that in the year 1184 (1777) a remote predecessor of the plaintiff, namely, one Jaswant Rai, who was then entitled to the whole of the mouzah Haturea, granted to the defendant's grandfather,

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Sheikh Domai, a permanent *howladari* pottah for 9 drones 14 kanies and odd of lands at a fixed rental of Rs. 421-7-10; that this rent had ever since been paid to the plaintiff's father and subsequently to the plaintiff; and that the fact of this *howla* was set up more than 12 years ago with the knowledge of the plaintiff and his father, the late Baboo Gopal Lal Tagore; and that, therefore, the plaintiff was now barred by limitation from questioning the *howla*. The written statement further contended that the meaning of the word "*kursa*" as given in the plaint was incorrect; and that the tenants of Pergunnah Edilpore, who had *kursa* rights, could acquire rights of occupancy by occupation for more than 12 years; that even upon the dowls filed by the plaintiff and the statements contained in the plaint it could not be said that the defendant was a tenant-at-will; and that, further, having continued to possess and enjoy the lands at a progressive rent for the reclamation of jungle, and without interruption from generation to generation, from before the Permanent Settlement, a right of occupancy had accrued to the defendant within, or subordinate to, the superior *howladari* interest.

The Court below has held that the person whose signature the notice to quit bears, had no authority whatsoever to give such a notice; that the defendant's tenure is at least a tenancy from year to year; and, therefore, a notice given in the middle of the year, requiring him to quit within fifteen days, was not a reasonable and sufficient notice, and that therefore the plaintiff is not entitled to eject the defendant in this suit.

Upon the matter of the excavation complained of in the plaint, the Subordinate Judge has found that the tanks were dug many years ago without any let or hindrance on the part of the zemindar, and has accordingly held that no ground for ejectment on this score is made out.

The title of the plaintiff to eject having failed, the Court below had next to consider whether or no the plaintiff was entitled to declaratory relief in respect of the *howla* set up by the defendant. Upon this question the Subordinate Judge has found that the lease set up by the defendant, that is to say, the *howladari* pottah of 1184, is a forged document, but that the existence of the *howla*, though not proved to be held at a

fixed rent from before the Permanent Settlement, is made out by the various rent receipts produced by the defendant, which described the tenure as a *howla* tenure, and that the said receipts were granted apparently with the knowledge of the naib and other superior officers of the plaintiff; and it must, therefore, be inferred that the plaintiff and his father were aware of the fact that a *howladari* title had been set up many years ago, that is to say, more than 12 years ago; and, therefore, both upon the ground that the defendant has made out that he has a *howla* right in the property in question, and also upon the ground that the said *howla* had been set up more than 12 years before suit, with the knowledge of the zemindar, the plaintiff is not entitled to question, and is, in fact, barred by limitation from now questioning the said *howla*. As regards the two dowls of the years 1250 and 1264 produced by the plaintiff, as having been executed by the defendant's father, Mahomed Ashak, the lower Court has found that they are untrue, and have been manufactured on the occasion of the rent suit of the year 1870. Having come to these conclusions the Subordinate Judge has dismissed the suit with costs.

The plaintiff has appealed to this Court; and we might here observe that no contention has been raised before us as to the notice served upon the defendant being valid in law, nor that the plaintiff is entitled to eject by reason of the excavations made by the defendant.

The points that have been raised by the learned Counsel for the appellant are: (1) that the setting up by the defendant of a permanent *howladari* right in the property in question amounted to a denial of the ordinary rights of the zemindar; and, therefore, the defendant must be taken to have forfeited his tenure; and the plaintiff is, therefore, entitled to eject the defendant without any previous notice to quit; (2) that the foundation upon which the *howladari* title was based having failed, namely, the lease of the year 1184 having been found by the lower Court to be a manufactured document, the Subordinate Judge ought, consistently with his finding, to have found that the defendant was entitled to no *howladari* interest in the lands; (3) that the rent receipts relied upon by the lower

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Court have not been proved according to law, and are not genuine; (4) that there is no proof whatsoever that as a matter of fact the *howladari* lease of 1184 was set up at any time with the knowledge of the plaintiff or his father previous to the suit of 1870, and therefore the plaintiff is not barred by the law of limitation from now questioning the said *howladari* title; (5) that the dowls produced by the plaintiff ought to have been found by the lower Court to be genuine; and, lastly, that even if the plaintiff be not entitled to eject the defendant, he is, at any rate, entitled to have a declaration to the effect that the *howladari* title set up by him is untrue.

The learned Advocate-General for the respondent, in the course of his arguments in support of the decree of the Court below, contended, among other matters, that the plaint disclosed no cause of action, and that the Court below ought to have found that the *howladari* lease of 1184 was a genuine instrument.

Upon the arguments raised before us, it would appear that there are *two* questions of law, and three questions of fact, involved in this appeal.

The questions of law are: (1) does the plaint disclose a cause of action; and (2) whether, in the absence of a notice to quit, is the plaintiff entitled to eject?

The questions of fact are: (1) whether the defendant is entitled to the *howla* which he claims; (2) whether the *howla* was set up more than 12 years ago with the knowledge of the plaintiff or his father; and (3) whether the defendant's father executed the dowls produced by the plaintiff.

Upon the question whether the plaint discloses any cause of action or not, as raised by the learned Advocate-General, we are clearly of opinion that it does. If the allegations in the plaint are correct the plaintiff has a perfectly good cause of action to maintain the suit. Whether or no the plaintiff has upon the evidence made out a cause of action is a different matter altogether, and a question which will be considered hereafter. We might, however, here observe that even if all other grounds fail, the setting up by the tenant defendant of a permanant tenure—a tenure which cannot be enhanced—is sufficient to give the zemin-

dar a cause of action to come into Court to have that title set aside ; and if the plaintiff has made out a case in respect of this matter, he would be entitled to relief.

The next question to be considered is, whether the setting up of a *howladari* title in the suit of the year 1870 by the defendant amounted to a disclaimer of the plaintiff's title as landlord ; whether in fact there has been a forfeiture of the tenure by the defendant such that the plaintiff is entitled to evict without putting an end to the tenure by a proper notice to quit. Now it will be observed that, although the defendant in the suit of 1870, and also in the present suit, repudiated the particular holding which the landlord attributes to him, yet he never questioned the landlord's right to receive the rent which it is agreed between the parties was being paid for many years together ; he did not in any sense repudiate the landlord's title. What he did was simply to question the right of the landlord to enhance the rent, and that, in our opinion, was not such a disclaimer as would result in law in a forfeiture of the tenure itself. Mr. Woodroffe in support of his contention quoted the case of *Vivian* v. *Moat* (1) and the case of *Baba* v. *Visvan Nath Joshi* (2). In the first mentioned case, the tenant denied the right of the landlord to raise his rent, and set up a title to hold the lands at a customary or quit rent. It was held that this was a disclaimer of the landlord's title, such as would obviate the necessity of a notice to quit. But it will be observed that the decision rests upon the ground that the title to hold land at a customary rent is inconsistent with the ordinary relationship of landlord and tenant, as it exists in England. Fry, J., observes : " Now what is a customary rent ? I understand that a customary rent means this : a rent which entitles the occupier to hold so long as he pays. There is therefore the suggestion that the late landlord and the present plaintiffs were not ordinary landlords of this estate, but were either lords of the manor or owners of some other right which gave them a title to a customary rent, which they could demand, and nothing more than that." And it will be further observed from the judgment, that the existence of the tenancy was not admitted until the time when the case came on for argument. We

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think, therefore, that the principle upon which that decision is based is wholly inapplicable in Bengal, where rights grow up under the law, such as rights of occupancy, irrespective of contract, and where there are numerous tenures held by persons at fixed rents, and it has never been understood in this country that the assertion of such a right is a denial of the landlord's title *as such*. As regards the case cited by the learned Counsel from the Bombay reports, we need only say that it is apparently based upon the case of *Vivian* v. *Moat* and the other English cases quoted therein, and that, for the reasons already mentioned, we are not prepared to follow the rule of law laid down in it.

But apart from these considerations, it appears to us to be perfectly clear, that if there was a forfeiture of the tenancy by what the defendant said in the suit of 1870, there has been since then a distinct waiver on the part of the landlord of his right to evict upon that ground; for it has been found in the judgment of the Court below, and, in fact, it was conceded in the course of the argument for the plaintiff, that since the suit of 1870 the plaintiff has continued to receive the same rent which the defendant had been paying previous to the suit of 1870, until within a short time before the institution of the present suit; and it was not until 1882 that the plaintiff gave the defendant a notice to quit, apparently treating him as a tenant up to that time. And it is further noteworthy that even in the said notice the plaintiff does not rely upon the alleged forfeiture as a ground upon which the defendant should be ejected.

We may here observe that upon the plaintiff's own case as disclosed in his plaint, and the dowls propounded by him, the defendant is at least a tenant from year to year, and that being so, it seems to us to be clear that this tenancy must be terminated by a proper notice to quit before a suit for ejectment can be maintained; and it follows, therefore, that the plaintiff is not entitled to a decree for ejectment in this suit.

(The Court then dealt with the questions of fact: this potiron of the judgment is omitted as being unnecessary for this report.) The result, therefore, is that the claim for ejectment must be

dismissed, but that a declaration must be given in favor of the plaintiff to the effect that the defendant has no *howladari* interest in the lands covered by the suit; and in this respect the decree of the Court below must be altered. 1886

As regards the costs of the suit, we think that each party, having set up a case which is either false or unproven, they should bear their own costs in both the Courts.

J. V. W.

*Decree varied.*

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*Before Mr. Justice Mitter and Mr. Justice Norris.*

NAUN SINGH (PLAINTIFF) *v.* RASH BEHARI SINGH AND OTHERS (DEFENDANTS).* 1886 *April* 30.

*Valuation of Suit—Suit for pre-emption—Jurisdiction—Bengal Civil Courts Act (VI of 1871), s. 20.*

In a pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under s. 20, Act VI of 1871.

THIS suit was brought for the enforcement of the plaintiff's right of pre-emption. The property in dispute was sold to the defendants for Rs. 700. The plaintiff sought to recover possession of it by the cancellation of the aforesaid sale on payment of Rs. 700 to the defendants (purchasers.) The suit was brought in the Munsiff's Court. The defendants amongst other pleas objected to the jurisdiction of the Court, on the ground that the property sought to be recovered was of the value of more than Rs. 1,000.

The Munsiff overruling this objection dismissed the suit upon the merits. The plaintiff preferred an appeal against the Munsiff's decree. The Subordinate Judge, on the objection of the defendants, re-opened the question of jurisdiction, and finding that the property in dispute was of the value of more than Rs. 1,000 dismissed the suit upon the ground that the Munsiff had no jurisdiction to entertain it.

* Appeal from Appellate Decree No. 1257 of 1885, against the decree of Baboo Abinash Chunder Mitter, Subordinate Judge of Patna, dated the 27th of March 1885, affirming the decree of Rai Baboo Sheo Sarun Lal Bahadur, Munsiff of Patna, dated the 28th of April 1884.